United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. SYNNOTT, a Creditor, Individually, and as the Duly Authorized Attorney for, and Agent of ALEXANDER SEDGWICK and MERRILL K. GREEN,

Appellant,

vs.

THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED, Bankrupt, and A. L. GROW, as Trustee in Bankruptcy of THE TOMBSTONE CONSOLIDATED MINES COMPANY, Bankrupt,

Appellees.

Brief of Appellee

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☆ Tucson, Ariz.,

Number 2263

IN THE

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APPELLEE'S BRIEF

The remarkable "Special Contract Bond" upon which Appellant bases his proof of claim has been so clearly and admirably dissected by the Honorable District Court that we might well rest upon its statement of the matter, which is wholly unanswerable. Considering the instrument as a whole and "reading each clause in the light of its context and evident relation to the other parts of the instrument" the learned Court notes:

FIRST: "A careful reading and study of the instrument will disclose no provision from which may be inferred an intent to create a general lien on the assets of the min-

ing company as security for its payment. On the contrary, the whole tenor of the instrument is that the lien intended to be created was one that should be limited to the surplus earnings of the Company." (Tr. p. 21.)

SECOND: "There is no definite promise of payment of either interest or principal expressed in the bond." (Tr. p. 22.)

THIRD: "Unless a new and different contract from that expressed be read into the bond, there is insufficient warrant for holding that the instrument permits the holders of these bonds to assert rights to the prejudice of the general creditors." (Tr. p. 23.)

Each of Appellant's contention on this appeal is fully and conclusively answered when measured by the three propositions thus stated by the District Court. No construction or interpretation of this instrument can, without violating its express provisions, give Appellant the status of a lien creditor, or convert the instrument into a definite promise to pay anything. The construction contended for by Appellant amounts simply to this: that these alleged bonds which when issued purported to create a contingent lien only upon the surplus earnings of a going concern have now, through the bankruptcy of the Company, become fixed and matured obligations secured by a lien upon the bankrupt's property which takes precedence over upwards of Two Million Dollars ($2,000,000) of allowed and unsecured claims.

Under this construction, it is clear that, so long as the company kept out of bankruptcy, the obligation of these bonds, being restricted to surplus earnings, was subsequent to the claims of these creditors, who might then have brought suits upon their several claims, reduced them to judgments and satisfied their judgments, notwithstanding these bonds, out of the identical property

now claimed to be burdened by the alleged lien of these bondholders. Thus, by virtue of bankruptcy, these bonds acquire an entirely new and vastly more favorable status, a status which they are not claimed to have enjoyed before the petition in bankruptcy was filed, which is consequent solely upon the filing of such petition and is magically created thereby. The filing of the petition which is so often referred to as a caveat, or attachment against the whole world, irrevocably crystallizing the status of all persons interested in the estate, is thus made to work an instantaneous and kaleidoscopic change, wiping out the priority of unsecured creditors and casting them behind a Three Million Dollar ($3,000,000) issue of bonds, theretofore floating in the clouds and restricted to such satisfaction as might be afforded by surplus earnings, but now become a first lien upon the corpus of the estate. We submit that:

I.

THE CLAIM PRESENTED IS NOT PROVABLE IN BANKRUPTCY.

The vice of Appellant's contention is obvious. He ignores the elementary rule that the provability of a claim in bankruptcy depends upon its status at the time the petition in bankruptcy is filed.

Bankruptcy Act, Sec. 63.

Collier on Bankruptcy, 8th Ed. p. 701; 9th Ed., p. 854.

In re Neff, 157 Fed., 57.

In order to be provable, the debt upon which the claim is founded must be a *fixed liability absolutely owing* at the time the petition is filed.

Collier on Bankruptcy, 8th Ed., p. 706; 9th Ed., p. 854, 867.

County Commissioners v. *Hurley*, 169 Fed., 22.

In re Adams, 130 Fed., 381.

It is clear that these bonds were not secured by any lien, except possibly upon surplus earnings, at or prior to the filing of the petition in bankruptcy. They were not promissory notes, because no definite time for payment is anywhere expressed or implied therein. In other words, they were not then fixed liabilities absolutely owing, but were then contingent liabilities contingently owing. They were then owing only upon the contingency that the earnings of the company should permit the creation and maintenance of the Interest and Retirement Funds mentioned in the bonds. The company might operate indefinitely, pay its debts and never be able to create the contemplated Retirement or Interest Funds. Or, it might maintain the Interest Fund, pay four per cent to its stockholders and never be able to create the Retirement Fund. Therefore, the contingency mentioned was one which might never arise. A claim based upon such a contingency clearly is not provable.

In re Hartman, 166 Fed., 776.

By the terms of the bond, the par value thereof is payable in twenty equal installments "represented by the attached coupons from and out of a RETIREMENT FUND created from the net surplus earnings of the company, as hereinafter stipulated, at the times and upon the terms and conditions hereinafter stated, *but not otherwise*." The company "agrees to pay to the registered holder hereof in like gold coin from an INTEREST FUND created from the net surplus earnings of the company as hereinafter stipulated, *and not otherwise*, interest on the face value of this bond, or so much thereof as may from time to time remain unpaid, at the rate of six per centum (6%) per annum, payable semi-annually". Reference is then made to the back of the bond for "the terms and conditions governing the payment of this bond, and the payment of the installment coupons hereto attached, and the interest there-

on". Annexed to each bond, are twenty (20) "Installment Coupons", each representing "one-twentieth of the principal" of the bond, to which it is annexed. This coupon sets forth that it will be paid "from the Retirement Fund of said company created in the manner and applicable to the payment hereof as per the terms and conditions stipulated in the attached bond *and not otherwise.*"

It is to the face of the bond and coupons one would naturally look to ascertain the *obligations* of the bond. It appears therefrom, clearly, positively and repeatedly that the bondholder has recourse only to the Retirement Fund, and the Interest Fund to be created out of the net surplus earnings of the company, and not otherwise. The bond specifies no period or date of maturity for the bonds or coupons.

On the back of the bond are set forth the terms and conditions subject to which it is issued by the company, and accepted by the purchaser. Clause I governs the company in the application and use of the money derived from the sale of the bonds. Clause II requires the company out of its earnings to create and maintain several funds described as follows:—

(a) AN OPERATING FUND for carrying on the current business of the company.

(b) AN INTEREST FUND to take care of the interest on the bonds, as to which it is expressly agreed and understood that no payment of interest is promised, or shall be made, except from and out of the INTEREST FUND in this clause named, and that said fund shall be created and maintained solely from the surplus earnings of the company as herein set forth, and not otherwise.

(c) A RETIREMENT FUND "*from which* shall be paid from time to time the installment coupons * * * * * to which shall be transferred all net surplus earnings of the

company *not required for the creation and maintenance of the special funds hereinbefore named, or the payment of dividends upon the stock of the company,* which stock dividends shall not be accumulative and shall not exceed four per centum per annum until such time as all bonds issued by the company shall have been paid and redeemed."

Clause III specifies the application to be made of the earnings of the company. It is therein provided that the earnings "shall be used, paid and applied for the following purposes, *but only in the order herein in this clause stated.*"

First, it is required that the current expenses of the company shall be paid or provided for, and the Operating Fund kept as nearly unimpaired as the earnings of the company will permit. Second, the earnings yet remaining must be applied to the payment of interest installments on the bonds, and to keep the Interest Fund as nearly unimpaired as the earnings will permit. No dividends shall be paid upon the stock of the company while it is in default as to the interest on bonds. Third, the earnings yet remaining may be applied to the payment of the dividend on the stock of the company. Finally, it is provided that all the earnings of the company then remaining shall be transferred to the Retirement Fund.

Clause V, provides that in the event of liquidation or dissolution of the company, the bonds shall be paid "before any distribution is made of any of the assets of the company to the holders of the stock of the company."

Clause VI, disables the company to "execute, sign or deliver any mortgage, deed of trust, conveyance, lease, release, or waiver, or other instrument which shall, *subject to the terms and conditions of this agreement*, be prior to, or in any way, give a preference as against, or over, the rights" of the bondholders. By the terms of Clause VII, "it is expressly agreed and understood by the holder of this

bond, that the *obligation hereby created* is solely against the company as such, and *is only against the Retirement Fund* created from the surplus earnings of the company as hereinbefore stipulated. Provided, that in the event of liquidation or dissolution of the company, *the obligations of this bond* shall immediately extend and attach to all the funds and other assets of the company whatsoever, as in Clause V of this instrument above stipulated and set forth. The company further covenants and agrees that the total bonds of this issue outstanding at any time and as a unit shall be deemed and taken, *subject to, and in accordance with the conditions hereinbefore set forth* to control the title to all the property of the company, real and personal, etc.

We submit that it is perfectly clear that these bonds could not in any event be payable out of anything excepting the net surplus earnings of the company after the application thereof as required by the bond. This is constantly reiterated in the bonds and the coupons. The provision of Clause V, that in the event of liquidation or dissolution, the bonds shall be paid before any distribution of the company assets is made to the stockholders, is entirely consistent with the earlier provisions that dividends shall not be paid upon the stock while the company is in default as to the interest, but that such dividends not exceeding four per centum (4%) may be paid while the company is not in such default and before anything is set apart to retire the principal of the bonds.

Clause VI must be construed merely as disabling the company to execute any instrument which would create a prior claim or lien upon the net earnings of the company which might otherwise be applicable to the retirement of the bonds, or the payment of the interest thereon. The provision in Clause VII, that in the event of liquidation or dissolution, the *obligations* of the bonds shall extend and at-

tach to all the funds and assets of the company, must be interpreted in full view of the nature of those obligations, which as we have seen, are clearly restricted to the net earnings. When the company covenants that the bonds shall control the title to the company's property, subject to, and in accordance with the conditions set forth in the bonds, it absolutely negatives the idea contended for by petitioners, that in such event the bonds should be payable out of the property itself, because such method of payment would not be in accordance with the conditions set forth in the bonds.

Assuming as we must in this proceeding, that the company is insolvent, it is clear that the bondholders can have no relief under the provisions of Clause V, giving them a priority over the stockholders. In order to have any standing whatever, petitioners should aver that Interest and Retirement Funds were created, and that something remains therein which may be properly applied to the payment of the bonds. They must aver that there were net earnings which should be applied to their relief. Such averments could not avail them anything in this proceeding, but under the terms of the bonds, they would doubtless have a right by proper action, to have it judicially determined whether there are any funds which might properly be applied to the payment of their bonds.

Morse v. *Bay City Gas Co.*, 91 Fed., 938.
Edwards v. *Bay City Gas Co.*, 91 Fed., 946.
St. John v. *Erie Ry. Co.*, 89 U. S., 136; 22 L. Ed., 743, 746.

From all of the foregoing, it is apparent that at or before the commencement of bankruptcy proceedings, a holder of one of these bonds could not have maintained an action for its collection out of the corpus of the company's property. The only conceivable remedy would have been a suit for the proper application of any net earnings of the company as

required by the bonds. Manifestly, a bondholder would not have been qualified to institute these bankruptcy proceedings against the company, since his claim was not then a fixed liability absolutely owing. Necessarily, then, this claim is not provable in bankruptcy.

II.

THE BONDS ARE NOT SECURED CLAIMS BUT ARE NOTHING MORE THAN A SPECIES OF PREFERRED STOCK.

Since it is clear that Appellant does not present a provable claim, further discussion of his status becomes somewhat academic. His claim to security rests upon the following conclusion of law contained in his proof of claim:

"and that the only security held by the deponent or his principals for said debt is the following: Said 461 Special Contract Bonds which consist of a first lien on all of the assets of said bankrupt estate, subject to the right of other bondholders to participate in the same" (Tr. p. 7).

Upon this basis, Appellant urged in the District Court that his claim should be allowed as a secured claim. Nothing is shown to render such alleged security valid as against the Trustee. Formerly, a Trustee stepped into the shoes of the bankrupt and could avoid no claim which was good against the bankrupt. But, under the Bankruptcy Act as amended in 1910 the Trustee is "vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon", and as to property not in the custody of the bankruptcy court is "vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

Bankruptcy Act, Sec. 47.

Under this amendment, the alleged security would not be

good against the Trustee herein, unless it would also be good against an attaching or judgment creditor.

In re Hartdagen, 189 Fed., 546.

In re Gehris-Herbine Co., 188 Fed., 502.

Manifestly, the bond here presented would not be recordable under Paragraphs 748, 749 and 753, Revised Statutes of Arizona, 1901, reading as follows:

748. (Sec. 28.) "The following instruments of writing, *which shall have been acknowledged* according to law, are authorized to be recorded, viz: all deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands and tenements, or goods and chattels, or movable property of any description."

749. (Sec. 29.) "All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, *unless they shall be acknowledged* and filed with the recorder, to be recorder, as required by law, or where record is not required, deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

753. (Sec. 33.) "The record of any grant, deed or instrument of writing authorized or required to be recorded, *which shall have been duly acknowledged* for record and duly recorded in the proper county, shall be

taken and held as notice to all persons of the existence of such grant, deed or instrument."

The bond here presented, not being acknowledged, would not be recordable under these sections, even if it were otherwise recordable. Nor is it claimed in Appellant's proof of claim that the bond, or any evidence thereof was recorded as required by law. Consequently, it could have no validity against the Trustee in Bankruptcy under the amended Bankruptcy Act.

The bond bears a strong analogy to a species of cumulative preferred stock. This appears in the provision entitling the stockholders to four per cent (4%) dividends before any part of earnings shall go into the Retirement Fund and in the further provision giving the bondholders priority over the stockholders upon liquidation or dissolution. The bond provides that the proceeds of the bond issue shall be devoted to purposes whereby they would become a *part of the capital of the company.* But where a preferred stock certificate provided that it should be "a preferred lien on the assets of the company" it was held:

> "But these words are to be construed along with the entire instrument, and it is manifest from the whole paper that the corporation never intended to place the petitioner in the position of a creditor, but only to give her and like stockholders a preferred lien on the assets of the corporation, when in liquidation, over the common stockholders."
>
> *Weaver Power Co.* v. *Elk Mountain Mill Co.*, 69 S. E., 747, 748.

As pointed out in *Hamlin* v. *R. R.*, 76 Fed., 664.

> "It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid."

See also, *Hamlin v. Toledo, etc., R. R.*, 95 Fed., 497, 530.

Appellant's contention here is in violation of this fundamental principle, and if upheld, would withdraw the capital of the bankrupt from administration in bankruptcy for the benefit of its creditors. But the bankrupt's capital is a trust fund for the benefit of these creditors, who are entitled to have their debts paid therefrom before any distribution thereof, is made to the stockholders or alleged bond holders.

Jones on Insolvent and Failing Corporations, page 766.

III.

APPELLANT'S PROOF OF CLAIM IS INSUFFICIENT

It is important to the administration of this estate that the status of these bonds be finally determined, and we therefore do not desire to prevent such determination, but in presenting the matter upon the whole record, we suggest the obvious and fatal failure of Appellant in his proof of claim to state the consideration upon which it is based.

In re Coventry-Evans F. Co., 166 Fed., 516.

In re Stevens, 104 Fed., 325; 107 Fed., 243.

Since preparing the foregoing, we are in receipt of Appellant's Brief, to which we shall briefly advert:

By way of an appendix to his brief, Appellant seeks to introduce into the record on this appeal, matters which are wholly extraneous thereto, and are not referred to, or in any degree supported by the record. This record was made by Appellant. It was prepared in accordance with his praecipe (Tr. p. 33), wherein he must be taken to have indicated the record upon which he desired this appeal to be heard. No proper proceeding is now taken or suggested for the purpose of bringing up from the lower court any

additional matters of record. It does not appear that the matters included in the appendix were ever, or are now, a part of the record of this proceeding, either before the Referee or the District Court. On the contrary, the bill in equity (Appellant's Br. pp. 40 et seq.) was verified December 12, 1912 (Appellant's Br. p. 51), and therefore must have been filed some four months after the order herein appealed from was entered by the Referee, that order being dated August 8, 1912, (Tr. p. 3). We confess our astonishment therefore, that this bill in equity should be brought forward as having any bearing upon the correctness of the Referee's order, which is the only question presented upon this appeal. We do not understand that it is the practice of this, or any other court, on appeal to permit such unauthenticated and informal additions to the record, or to determine an appeal upon anything else than the record actually presented. Only matters of record will be considered.

Ross v. *Stroh*, 165 Fed., 628.
In re O'Connell, 137 Fed., 838.

Suggestion is made that Appellant has consistently taken the position that he should be permitted to offer parole evidence in support of his proof of claim (Appellant's Br. p. 33), but that he has been denied the opportunity to do so. We respectfully suggest that the record does not in any degree support this statement.

The minute entries of the District Court (Tr. pp. 14 et seq.) do not bear out the statement. The proof of claim upon which Appellant relies made no suggestion of his desire to offer parole proof; nor is there an assignment of error in relation to any refusal of the Referee or District Court to receive such proof. It is stated that the District Court refused Appellant's request that the determination of this appeal should be delayed until the hearing of the alleged suit in equity. Nothing in the record supports this contention, but conceding that such a request was made, it

should be borne in mind that this matter was then before the District Court, not as an original proceeding, but as a proceeding to review the order of the Referee disallowing Appellant's proof of claim. It would be strange indeed if the District Court should delay the orderly and prompt disposition of bankruptcy matters pending before it on appeal upon the *ex parte* suggestion that a suit had been filed entirely outside of the bankruptcy proceedings, upon the hearing of which certain evidence might be introduced, which was not before the Referee, but which might be considered by the court to have some bearing upon its disposition of the pending appeal.

Appellant even goes so far as to attempt an outline of certain alleged evidence which may hereafter be presented in the suit in equity (Appellant's Br. p. 36). In the course of this outline, it is urged that the general creditors whose claims have been allowed in this proceeding, aggregating upwards of Two Million Five Hundred Thousand Dollars ($2,500,000) are the persons who brought about the sale of these bonds, and that they are estopped to question the priority of the bonds over the unsecured claims. In this manner, a plea of estoppel is sought to be presented for the first time in this court, based upon unsupported statements of matters wholly outside of the record, and which have never been, and which are not now, relevant to any question presented upon this appeal. It is difficult temperately to characterize Appellant's gratuitous and wholly unfounded charge that the unsecured creditors have been guilty of some species of fraud or misrepresentation in the sale of these bonds (Appellant's Br. p. 37). If the truth or falsity of these charges were now a relevant matter, we would not hesitate to controvert these statements in the terms which they deserve, but we do not consider that this court would care to enter upon the consideration of such a controversy on this proceeding. Appellant mentions only five of the

large number of creditors whose claims have been proven and allowed in these proceedings (Appellant's Br. p. 37). It is manifest that the lower court is open for any proper complaints as to the allowance of any of the claims which have heretofore been proven and allowed in this proceeding. If there is any disposition on the part of anyone to question the correctness of any of these claims, he should make his complaint to the Referee having this matter in charge, and not attempt to suggest it for the first time upon the consideration of an appeal in this court.

As stated by Appellant, The Tombstone Consolidated Mines Company, Limited, was adjudicated bankrupt August 10, 1911. Appellant's proof of claim was filed August 8, 1912, three days before the expiration of the year within which claims might be filed against the estate. While Appellant was wholly within his rights in thus delaying the presentation of his claim, the result of the pendency of these proceedings to determine the status of these bonds has been to delay the closing of the estate in bankruptcy, and to postpone the distribution of the estate among the unsecured creditors to whom it properly should go.

The suit in equity, filed some five months after Appellant's right to prove his claim in bankruptcy, is still pending. No reason appears why this suit should not have been filed much earlier than it was. At all times since the adjudication in bankruptcy herein, and for a long time prior thereto, Appellant was in no way prevented from taking such course as would protect his rights. If the suit in equity is the proper proceeding for this purpose, his rights may still be determined therein, and upon the hearing of that case, Appellant will doubtless have ample opportunity to bring forward such evidence as may be available in support of the allegations of his bill.

A fair inference to be drawn from the history of this proceeding as narrated by Appellant, is that by postponing the

presentation of his claim until almost the last moment within which it might be presented, and in delaying the institution of his suit in equity, Appellant has not been animated by a desire for a speedy administration of this estate in bankruptcy, but has rather been actuated by a desire to keep the matter in court as long as possible.

In his statement of the case, Appellant says,

> "It appears that on July 16, 1901, the bankrupt entered into a contract with the Development Company of America * * * * * This contract and a copy of bonds were duly filed and recorded on January 22, 1902, in the office of the County Recorder for the County of Cochise, in the State of Arizona, in Book 6 of Miscellaneous Records, at pages 45-62 inclusive." (Appellant's Br. p. 3.)

In preparing his proof of claim in this case, Appellant did not see fit to incorporate any of these facts, if facts they are, and we now suggest that there is no support in the record for any of the foregoing statement. No reason appears why Appellant should not have raised these questions in the Lower Court and before the Referee. Whereupon, the questions then arising, might have been given proper consideration, and it could have been ascertained what, if anything, had been filed for record, whether it was duly or properly acknowledged and whether it was a recordable instrument. Upon this appeal however, we earnestly insist that this court should determine the matter upon the record presented, leaving it to Appellant hereafter to raise and determine such matters as may be relevant in the equity suit. If, as Appellant seems to apprehend, the suit in equity was filed too late, it is not apparent that this court is now able to accord him any relief, or that the Trustee in Bankruptcy, or any of the unsecured creditors are at all responsible for Appellant's delay in attempting to find a remedy for his alleged rights.

Appellant urges that the position taken here by the Trustee is astounding, because no one would have purchased these bonds if they were to be paid only from income. (Appellant's Br. p. 31.) The bonds amply show the purpose for which they were sold, namely, for the purpose of securing the capital with which to purchase mining properties, construct a railroad, install the necessary mining machinery and equipment, and operate the property (Appellant's Br. p. 62). That is to say: These bonds were sold for the purpose of procuring capital for the company. Their proceeds became a part of the company's capital; and the essence of Appellant's attempt here is to withdraw his contributions to capital to the detriment of the unsecured creditors who, under the terms of the bond were intended to be paid before the bondholders could get anything. If Appellant had so far developed his outline of the evidence (Appellant's Br. p. 36) as to show the entire facts of the transaction, it would be understood why it might be easy to dispose of these bonds, and thus secure the necessary capital, by assuring the purchasers thereof that their contributions to capital should be returned to them before anything should ever go upon liquidation of the company to those stockholders who should not be bondholders.

Attempting to interpret these bonds (Appellant's Br. pp. 27 et seq.) Appellant adopts a line of reasoning by which the bonds should not be construed as a whole, but should be interpreted by reference exclusively to certain isolated portions of the bond upon the theory that since these isolated portions do not include all of the contract expressed elsewhere in the bond, they should be held to be entirely controlling. But Appellant finds it necessary to go even beyond this line of reasoning, when he makes the following quotation from the bond (Appellant's Br. p. 22):

> "The bond of this issue outstanding at any time and as a unit shall be deemed and taken * * * * * to con-

trol the title to all of the property of the company, et cetera".

Thus omitting from this quotation, the controlling language thereof, which follows the word "taken", namely:

"Subject to, and in accordance with the conditions hereinbefore set forth."

It is suggested that our interpretation of these bonds leads to "the most unreasonable sophistry", and is only consistent with the theory that these bonds were issued in the pursuance of some fraudulent scheme (Appellant's Br. p. 27); to which we reply, that we merely construe these bonds according to their own expression, for the adoption of which we were in no wise responsible. If they were so drawn as to keep the word of promise to the ear, but break it to the hope, as is suggested by Appellant, we can only say that the Trustee herein takes the bonds as they are and asks that they be interpreted accordingly.

Appellant makes the naive suggestion that the Referee should have suspended his claim "pending the determination of the value of the security in some proper tribunal", or should have proceeded to determine the value of the security himself. (Appellant's Br. p. 26.) Since the bondholders' security consists of all of the property of the bankrupt, if they have any security at all, it is not necessary to determine the value of that security. If such security exists, the unsecured creditors get nothing.

In an attempt to read into these bonds a definite promise to pay, Appellant cites many cases to the effect that where a breach of contract results from a party's bankruptcy, the other party may liquidate his claim for damages, and prove it in the bankruptcy proceedings.

In re Swift, 112 Fed., 315.

In re Neff, 157 Fed., 57.

In re National Wire Co., 166 Fed., 631.

In re Duquesne Incandescent Light Co., 176 Fed., 785.

In all of these cases there appeared an absolute obligation, not contingent in any respect, but which the bankrupt failed to completely perform before bankruptcy. Of course, an elementary rule in bankruptcy permits the liquidation of the claim for damages for breach of contract if the Trustee does not elect to complete it. But Appellant is not here claiming damages for breach of contract. It is suggested that the bond imports an obligation of the bankrupt to continue operations and pay the bonds out of profits. This is far-fetched indeed. But it is not claimed that the bankrupt was at fault in failing to operate at a profit. No claim for damages for such default is suggested. If it were, the court might be called upon to attempt to determine how much might possibly have been realized for the bondholders by continued operations—an impossible problem. Appellant, on the contrary, claims the principal sum of the bonds with interest, as a fixed liability matured by bankruptcy. In other words, he asks the court to give him all of the relief to which he would have been entitled had the bankrupt's operations proven all of the success of which its promoters dreamed. For the purposes of his relief, this bankrupt must be deemed to have made enough profits to pay the bonds, but the unsecured creditors, who, by the terms of the bonds, were to be paid before any profits were applied upon the bonds, must now step aside and give the bondholders, not merely the imaginary profits, but the entire property of the bankrupt. We submit that Appellant's contention quickly reduces to an absurdity, and is wholly untenable, and that his citations of decisions concerning anticipatory breaches of contract and breaches arising where a party puts it beyond his power to perform are wholly beside the point here involved. These citations also include:

Lorell v. *St. Louis Mut. L. Ins. Co.*, 101 U. S., 264.
Ruehm v. *Harts*, 178 U. S., 14.

Reduced to its simplest terms, Appellant's contention is that by these bonds the bankrupt bound itself at all events to operate at sufficient profit to pay: (1) the expenses of operation, (2) the interest on the bonds, (3) four (4%) per cent dividends to its stockholders, and (4) the principal of the bonds, and since it went into bankruptcy it thereby broke its contract and became liable to pay these bonds with all of its property to the exclusion of its creditors:

Appellant states:

> "The fifth paragraph of the bonds, expressly states that in the event of liquidation or dissolution of the company all bonds with interest shall be paid before any distribution." (Appellant's Brief, p. 16.)

By adding the qualifying words "is made of any of the assets of the company to the holders of the stock of the company", the full meaning of clause V is apparent.

This clause V and other clauses, particularly clause VII, is much relied on as showing an equitable mortgage. In support of this theory, Appellant cites numerous cases wherein the most absolute showing of a fixed and secured obligation to pay appeared.

See: *Burt v. Rattle*, 31 Oh. St., 116, where a definite obligation with a fixed time for payment was secured by a bond and mortgage to a Trustee which was recorded as a realty mortgage, and filed as a chattel mortgage;

Heller v. National Marine Bank (Md. 1899), 45 L. R. A., 438, where the statute expressly provided that the preferred stock in question should be "a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage or other incumbrance", and where the legal requirements as to recording were fully complied with;

In re Peasley, 137 Fed., 190, where a vendee of land under a recorded contract for purchase, who had paid the pur-

chase price before bankruptcy was adjudged to have an equitable lien;

Stickel v. *Atwood*, 25 R. I., 456; 56 Atl., 687, where the bond presented was a "Ten Year Gold Bond" of the par value of One Hundred Dollars ($100.00) a definite obligation with a fixed time of payment and the question was whether a recital that the bond "is secured by all of the property and assets of this company" could constitute a false representation, there being no security, a radically different question from that presented here and a radically different provision from that in the bond at bar that the bonds "as a unit shall be deemed and taken, subject to and in accordance with the conditions hereinbefore set forth, to control the title," etc. (Clause VII.)

The bond here presented will be searched in vain for any mention of "security" or "lien" or "mortgage". On the contrary, the obligation thereby created "is solely against the company as such, and is only against the Retirement Fund created from the surplus earnings of the company, as hereinbefore stipulated" (Clause VII); it need only be paid "whenever a sufficient sum shall have accumulated in said Retirement Fund" (Clause III C)—and upon liquidation or dissolution it is "the obligations of this bond" which "immediately extend and attach" to the company's property (Clause VII), and when we search the bond for those "obligations" we find that they require payment "out of a Retirement Fund, created from the net surplus earnings of the company as hereinafter stipulated, at the times and upon the terms and conditions hereinafter stated *but not otherwise*."

Counsel are not far at sea when they detect traces of sophistry in the language of this remarkable instrument, but when they go outside the record to mention alleged representations under which these bonds were sold (Appellant's Br. p. 36), they again collide with Clause VIII recit-

ing that the bond is "authorized, sold, issued, purchased and accepted upon the terms and conditions hereinbefore stated and none other, and no officer, agent or other representative of the company shall have the power to waive or modify any provision or condition of this agreement, or to add any other provision or condition thereto."

As supporting the sufficiency of the proof of claim herein, Appellant cites *Baumhauer* v. *Austin*, 186 Fed., 260, wherein the sufficiency of the statement of consideration was not drawn in question, the statement was:

> "That the consideration of said debt is as follows: Money loaned and advanced by the deponent at divers times to said W. C. Baumhauer evidenced by a certain promissory note, etc."

This does not touch the question presented here, wherein the Appellant's proof of claim states "that the consideration of said debt is as follows: four hundred and sixty-one (461) Special Contract Bonds". (Tr. p. 7.)

As supporting his contention that the Trustee, took subject to the claim of the bondholders, even though no evidence thereof was recorded as required by the statutes of Arizona, hereinabove quoted, Appellant cites *Arctic Ice Machine Co.* v. *Armstrong County Trust Co.*, 192 Fed., 114.

It does not appear in that case whether the conditional sale contract was recorded, or was required to be recorded under the laws of Pennsylvania; but the case does not seem to us to have been carefully considered or correctly decided in the event that the contract was required to be, but was not recorded. An unrecorded contract of this character would be good as against the vendee and creditors without a lien. By the amendment of the Bankruptcy Act of June 25, 1910, the Trustee was given the position of a creditor with a lien. Creditors who had no lien at the time of this amendment might thereafter acquire a lien before the contract was recorded, and such lien would undoubtedly be

good against the vendor. The effect of the amendment is merely to give the Trustee the status of a lien creditor, which he did not formerly have. It would be entirely consistent with the holding in that case under the assumption we have made, to hold that an existing creditor without a lien at the date of such unrecorded contract could not thereafter invalidate said contract as to himself, by securing an attachment lien. In other words, that he could not thereafter change his status to the prejudice of the vendor in the contract.

In re Hartdagen, 189 Fed., 546.

Two unrecorded conditional sale contracts made between September, 1900, and January, 1910, were held invalid as against the Trustee in Bankruptcy under the amendment of June 25, 1910, bankruptcy having intervened September 13, 1910, the court holding,

> "This provision of the Bankruptcy Act puts the Trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor."

We are unable to appreciate that upon the execution of the contract in the Arctic Ice Machine case, the vendor acquired such vested right as might prevent a general creditor from thereafter requiring the status of a lien creditor to his detriment.

We submit that the logical and correct rule in this connection is stated *In re Hammond*, 188 Fed., 1020, wherein it was held that the amendment of 1910 was fully effective as against a mortgage executed prior thereto; the court saying:

> "At any time before or after the adoption of the amendment, any creditor by reducing his claim to judgment, and levying, or by suing out an attachment, could have defeated Fee's mortgage. At all times it was in peril of the individual action of Hammond's creditors in this way. The amendment of 1910 does nothing more under

these circumstances than to collectively put these creditors into the position of judgment or attaching creditors by representation. It simply offers another method of effecting a remedy against the mortgage which already existed in behalf of the creditors. * * * * * It seems to us that the amendment of 1910 very properly applies to this mortgage, and that as the law in its operation has the same practical effect as if the creditors of Hammond had severally levied, the appointment of the Trustee gives him priority."

It appears that the bankrupt has paid no interest whatever on the bonds here presented. For years the bondholders acquiesced in this failure without bringing any proceeding to determine whether or not they were entitled to any relief. The debts of the bankrupt accumulated until finally they aggregated upwards of Two Million Five Hundred Thousand Dollars ($2,500,000). Bankruptcy resulted. An adjudication was had and a Trustee elected. Barely within the year following adjudication, Appellant herein, and many other bondholders proved their claims before the Referee. Having appealed without success to the Referee and the District Court, all of the bondholders excepting Appellant dropped the matter. (Transcript p. 23.) Some four months after their claims were disallowed, some of the bondholders filed their suit in equity, as stated by Appellant, wherein they seek a foreclosure of their alleged mortgage (Appellant's Br. p. 49).

It is evident that this remedy of foreclosure, if it has ever existed at all, has been open to the bondholders for years. But having elected to present his claim in bankruptcy upon such record and proof as he thought necessary, Appellant now seeks for the first time and in this court to supplement the record made by himself, and now found to be unsatisfactory. The long-delayed suit in equity is now sought to be tacked to this proceeding, and Appellant asks

that the determination of this proceeding be delayed to await the outcome of the suit in equity. He asks that the unsecured creditors shall be thus delayed in the enjoyment of their right to a speedy administration of this estate in bankruptcy, and seeks to go outside the record in order to charge them with some vague responsibility for the plight of the bondholders.

We respectfully urge that it would be harsh indeed to accord such treatment to these creditors or to the Trustee. Whatever equities appear in this proceeding, are those of the unsecured creditors. Upon the record it must be assumed that they became such creditors without notice of these bonds. But even if each creditor had carefully read this bond before extending credit to the bankrupt, we confidently urge that he would merely have been advised that the bondholders had certain claims against the surplus income of the bankrupt after operating expenses were paid, and would have been justified in considering the corpus of the bankrupt's large properties clear and unencumbered. This estate should be closed without further delay. It has been in the hands of the Trustee almost two years. We invoke therefore, the application of the rule already announced by this court:

> "The bankruptcy law contemplates that the bankrupt's estate shall be administered with all convenient dispatch so that the property may be distributed among the creditors, and the bankrupt discharged from his debts, and to that end, parties litigant shall be alert and active to protect their rights, and to proceed with promptness in asserting the same."

Blanchard v. *Ammons*, 183 Fed., 556, 559.

Owing to the grave importance of this proceeding, we have perhaps given more attention to Appellant's contention than they warrant. We have refrained from following Appellant outside of the record for the purpose of attempt-

ing to try the equity suit at this time, but we cannot refrain from asserting that when that case shall be tried, Appellant will find it wholly impossible to substantiate the statements he now makes, either as to the alleged equities of the bondholders, or the alleged misdeeds of the general creditors. Nor can we believe those statements are now made with any confidence. They are made in a blind attempt to rest Appellant's case upon something else than the bonds themselves, and in the hope that this court may be sufficiently influenced by his suggestions *de hors* the record to assist Appellant in his evident purpose of indefinitely postponing the completion of this bankruptcy proceeding. But the Trustee stands here upon the language of the bond itself, and upon the record as made by Appellant himself, and, in closing, confidently urges that when the bond is read as a whole, "reading each clause in the light of its context and evident relation to the other parts of the instrument," as suggested by the learned District Judge, it will be found to contain no provision from which may be inferred an "intent to create a general lien on the assets of the mining company as security for its payment", or which imports "a definite promise of payment of either principal or interest".

We respectfully submit that the order appealed from should be affirmed.

Ellinwood & Rose

John Mason Rose

E. E. Ellinwood.

Attorneys for A. L. Grow, Trustee, Appellee.

No. 2263

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. SYNNOTT, a creditor, Individually, and as the duly authorized attorney for, and agent of ALEXANDER SEDGWICK and MERRILL K. GREEN,

Appellant.

vs.

THE TOMBSTONE CONSOLIDATED MINES COMPANY, Limited, Bankrupt, and A. L. GROW, as trustee in bankruptcy of the Tombstone Consolidated Mines Company, Bankrupt,

Appellees.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant in the above entitled cause respectfully petitions this Honorable Court to grant a re-

hearing of the above entitled cause upon the following grounds:

The question at issue in said cause and the merit of the contentions of the parties thereto, were not passed upon by this Honorable Court, as appears from the opinion of said Court filed on the 18th day of August, 1913, from which we quote the following:

> "It appears therefrom that the appellant, on the 8th day of August, 1912, filed with the Referee in Bankruptcy on behalf of himself and others, a claim against the bankrupt based upon 461 special contract bonds of the face value of $439,055, with interest thereon from the several dates of the bonds, which claim the referee disallowed on the ground that the instrument constituted contingent and not fixed liabilities of the bankrupt; that the appellant thereupon petitioned for a review of that decision of the referee by the Court below, which petition was granted, and that upon a hearing thereof, the Court took the same view of the bonds relied on by the appellant and affirmed the decision of the referee. It is from that decision of the Court that the present appeal was taken.
>
> While the record before us contains the 'Registered Name', 'Serial Nos.' and 'Face Value' of the bonds, it contains nothing whatever concerning the terms, provisions, or conditions of the bonds."

In connection therewith, the following facts are respectfully called to the attention of the Court, to wit: That on March 4, 1913, a stipulation was

entered into between the parties in the above entitled cause, providing that the special contract bond therein may be sent up on appeal, with the other papers herein, so as to obviate the necessity of making a complete copy thereof (see folio 33, page 30, Transcript on Appeal).

That pursuant to the above stipulation, the clerk of the District Court omitted making a copy of the bond for the Record on Appeal, but instead of said copy, and under instructions of the parties to the cause, said clerk sent up as part of said Transcript on Appeal the original bond, as appears from the certificate of said clerk of United States District Court (see Transcript of Record, page 35).

The bonds therefore referred to in the opinion of the Court as not being a part of the record on appeal, and hence not before the Court for consideration, were in point of fact received by the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on the 31st day of March, 1913, and were on that date placed of record in the above entitled cause herein and were properly before the Court.

We respectfully invite the Court's attention to the certificate of the clerk of this Honorable Court as follows:

"United States Circuit Court of Appeals for the Ninth Circuit.

Thomas W. Synnott, a creditor, etc., Appellant, vs. The Tombstone Consolidated Mines Company, Limited, Bankrupt, et al., Appellees.	No. 2263

CERTIFICATE OF CLERK OF U. S. CIRCUIT COURT OF APPEALS TO DATE OF RECEIPT OF CERTAIN SPECIAL CONTRACT BONDS OF TOMBSTONE CONSOLIDATED MINES COMPANY, ETC.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that Petitioner's Exhibits, viz.: 476 Special Contract Bonds of the Tombstone Consolidated Mines Company, were received by me from the Clerk of the District Court of the United States for the District of Arizona and placed of record in the above entitled cause in my office on the 31st day of March, A. D. 1913; and that the printed transcript of record in said cause was duly filed in my office on the 21st day of April, A. D. 1913; that the said cause was duly argued and submitted to said Circuit Court of Appeals for consideration and decision on the 13th day of May, A. D. 1913; and that an opinion was duly rendered and filed by the said Circuit Court of Appeals on the 18th day of August, A. D. 1913, in accordance with which opinion a decree was duly filed and entered affirming the judgment of the said District Court in said cause.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, in the State of California, this 3rd day of September, A. D. 1913.

(Seal) F. D. MONCKTON,
Clerk."

We also call the attention of the Court to the fact that a notation was made upon the calendar opposite the title of this cause directing the attention of this Honorable Court to the fact that the bonds referred to were on file with the clerk and were a part of the record for the consideration of the Court. Through mistake and inadvertance, in nowise attributable to appellant, the merits of the controversy were not examined into by this Honorable Court or passed upon in the opinion. Needless to say, the appellant in this very important cause is exceedingly anxious to obtain the judgment of this Court on the merits of the controversy, and hence this petition is most respectfully submitted.

ADAMS & BLINN,
AMOS L. TAYLOR,
DOAN & DOAN,
Counsel for Appellant and Petitioner.

THOMAS E. HAYDEN,
Of Counsel.

CERTIFICATE OF COUNSEL.

THOMAS E. HAYDEN, attorney at law, hereby certifies, that in his judgment the petition for rehearing is well founded in point of law and that said petition is not interposed for delay.

THOMAS E. HAYDEN,
Of Counsel for Appellant and Petitioner.